

IN THE UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 6

PIZZA PIAZZA, INC. D/B/A BADO'S PIZZERIA
& DELICATESSEN AND D/B/A BADO'S PIZZA
GRILL AND ALE HOUSE,

Respondent

And

ANDREW YOHO, and Individual,

Charging Party

Case 06-CA-279455

JUDGE SANDRON

Type of Pleading:

BRIEF FOR RESPONDENT

Filed on Behalf of Pizza Piazza, Inc.
d/b/a Bado's Pizzeria & Delicatessen
and d/b/a Bado's Pizza Grill and Ale
House

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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SIX**

**PIZZA PIAZZA, INC. D/B/A BADO'S PIZZERIA
& DELICATESSEN AND D/B/A BADO'S PIZZA
GRILL AND ALE HOUSE**

Respondent,

And

Case 06-CA-279445

ANDREW YOHO, and Individual

Charging Party.

BRIEF FOR RESPONDENT

And Now comes Respondent, Pizza Piazza, Inc., by and through its attorney, John Linkosky, Esquire and files this Brief for Respondent and in support thereof states as follows:

Facts

After the record was opened in February, 2022, the within matter was tried over the course of a single day before the Honorable Ira Sandron, on April 26, 2022. At the Trial, the NLRB-Region 6 was represented by Julie Stern, Esquire and Jessica Michael, Esquire. The Respondent was represented by John Linkosky, Esquire and the Charging Party, Andrew Yoho, was present on his own behalf.

The case involves Andrew Yoho's (hereinafter "Yoho") alleged termination from employment by Frank Badolato, the owner of the Respondent company, on July 1, 2021, allegedly as the result of Yoho engaging in concerted activities with other employees on June 29, 2021 for the purposes of mutual aid and protection by complaining with other

employees and walking out in protest over staffing shortages. (Complaint Paragraph 7(a)) and for allegedly engaging in concerted activities on July 1, 2021 by verbally complaining about staffing shortages and unsanitary conditions in the kitchen (Complaint Paragraph 7(b)). The Complaint alleges that on July 1, 2021, Frank Badolato threatened employees with discharge, told employees they did not have the right to complain about wages, hours and working conditions, and that he discharged Yoho because “employees engaged in the conduct described above in Paragraphs 7(a) and (b) and to discourage employees from engaging in these or other concerted activities” (Complaint Paragraph 9).

In support of its case, General Counsel first offered the testimony of Andrew Yoho (TR 35).

Yoho testified that he started working for Bado’s on February 1, 2021 and his last day of work was June 29, 2021 (TR 36). Yoho described Bado’s an Italian restaurant that specializes in pizza and Italian cuisine with a bar in the front of the building, next to where people would sit to have dinner. (Id). Yoho worked in the back where he would prepare the food, wash the dishes and he took orders. (Id). Yoho’s job title was “chef” or, as he described it, he was a cook and was primarily hired as a pizza maker because of his experience. He testified he would also make salads, sandwiches and prepare take-out orders from customers that were to be delivered. (Id).

Yoho described the “front of the house” portion of Bado’s restaurant as referring to anything that deals with the customers (TR 37). Yoho described a separate part of Bado’s restaurant that was partitioned by two walls and that the front of the house contained a dining room and a bar (TR 37).

Yoho knew what hours he was scheduled to work because of a schedule posted “usually on Sunday” for the period of a week (TR 38). The schedule was prepared by Frank and Marianna (Logston) (Id). Marianna, according to Yoho, was “involved in the paperwork, involved in the hiring process, and so, I always sort of understood her to be sort of the administrator.” (Id).

Yoho testified that on average, three (3) people worked in the back, those being him, Randy Bishop, Aiden Smith, Scott Whitacker, George Pikris and occasionally, the owner’s son-in-law, Chris Smith. (TR 39). Yoho testified that he considered his direct supervisor to be George Pikris and his secondary supervisor to be Randy Bishop (TR 40).

Yoho testified that, in general, he saw Frank Badolato, the owner of Bado’s, on Friday nights when he would come in for a few hours to work the pizza line, Sunday mornings when he would work brunch at the grill and occasionally when he would be preparing the food truck or bringing stuff, supplies for the restaurant, from places like Restaurant Depot (TR 41). Yoho testified he would primarily encounter Marianna Logston when she would leave through the kitchen and that Leah Badolato, Frank Badolato’s daughter, was the “front of the house” manager, who, according to Yoho, managed the servers and controlled the dealings with the customers (TR 42). Chris Smith is married to Leah Badolato (Id). Yoho testified he saw Chris Smith roughly two (2) to three (3) times a week when Chris Smith worked the central area of the kitchen that prepared sandwiches and salads or when Chris Smith would work on the pizza station as well. (TR 43). Yoho testified that when he needed a change in his schedule, he would write his request on a piece of paper and attach it to where the schedule was located and whenever he did that, he would talk to his co-workers in the kitchen, in particular,

George, letting him know that he (Yoho) might be absent from work “so he would not be caught off guard when the week showed up and I would be scheduled off” (TR 44).

Yoho asked permission from Frank Badolato and Marianna Logston when he needed to take time off (Id). On one occasion, he was experiencing back pain, had to go to the ER and left work early (Id). On that occasion, he told George that he needed to leave (TR 45). That incident occurred in June of 2021 (Id). From day one, Yoho testified he was introduced to George “as the guy who would show me around and show me what to do” and Yoho testified that any time he was uncertain of something, he would go to George and say “hey, how do I do this” (TR 45).

Yoho testified about the delegation of duties among the kitchen staff and that he had discussions with Scott Whitacker, Aiden Smith and Randy Bishop, frequently, about issues that came up at work, such as understaffing, unsanitary conditions at the restaurant and generally, “we also spoke about stuff that was outside of our work duties, such as dishwashing.” (TR 46, 47). Yoho testified that on a couple of instances he spoke about food safety with George, such as temperature of the meat, handling of meat, leaving stuff out for too long and those sorts of things (TR 47). Yoho testified that Randy and Scott often had to deal with more issues involved with the grill, particularly a ceiling leak (TR 47, 48).

Yoho then testified about what he characterized as “my biggest issue that culminated near the end of my time there” being an issue with a lack of plastic gloves which he termed necessary if you are dealing with raw meat. (TR 48).

He also testified he had mentioned to George the temperature of meat and that he felt that meat left in the top of the pizza prep station would not stay cool enough. (Id).

He, at times, left a note saying “please stop putting meat here” and he would come in the next day and the meat would still be there but the note would be gone. (Id).

Yoho testified that he had these various discussions with George Pikris and that “George was our point person when it came to communicating issues to Frank. We didn’t see Frank enough to communicate those issues to him. When we did see him, we were too busy working. So, I would talk to George – well, I talked to George – we all talked to George, but myself, Randy, Scott and Aiden talked to George about how, in particular, we needed a dishwasher, we needed more people working in the kitchen if we were going to continue to be this busy and then George would tell us that he would handle it.” (TR 49-50). Yoho testified that on occasion, in the restaurant, they would talk in a group for short bouts of time and that they had talked about scheduling a group meeting with the whole “back of house” could come together and talk about the issues with management and the owners. That meeting was supposed to be in tandem with a meeting that was had for the front of the house and with the express purpose of talking about these issues. (TR 50, 51). In response to a question by Judge Sandron, Yoho testified that the meeting with management he was referring to was not a meeting that was suggested by or scheduled at the request of employees, but was rather a meeting that was planned by management. (TR 108, 109).

The questioning by Judge Sandron and responses by Yoho went as follows:

JUDGE SANDRON: So that was not at an employee meeting, apart from management. It was a management-sponsored meeting that he understood was going to take place.

THE WITNESS: It was supposed to be a sit down to talk about the –

JUDGE SANDRON: With management?

THE WITNESS: Yes.

(TR 109).

Yoho testified that on June 29, 2021 he was working in the kitchen with Aiden Smith and Scott Whitacker, all day (TR 54) and his shift was “open to close” (Id).

General Counsel introduced its Exhibit 3 and had Yoho read his starting time as 11:00 AM that day, along with Scott W. and Aiden S. (TR 55). On June 29, 2021, Yoho, Aiden Smith and Scott Whitacker were scheduled to work in the kitchen from 11:00 AM until close and George Pikris, Randy Bishop, Chris Smith and Frank Badolato were not scheduled to work that shift (TR 56, 57, General Counsel’s Exhibit 3).

Yoho testified that on June 29, 2021, he had two (2) separate interactions with Frank Badolato about the unavailability of plastic gloves in the restaurant that day (TR 57, 58). Yoho testified that they had run out of gloves the previous day that he worked, that Sunday, and when he came in and saw that they were still out of gloves on Tuesday, the 29th, he mentioned it to Frank (TR 58). His first conversation with Frank Badolato took place in the kitchen before noon, so within the first hour he was at work (Id). Yoho went on to describe, in response to questioning by Judge Sandron, that he stated: “Frank, we have no gloves” and Frank responded “Why do we need gloves?” and Yoho stated “We need them to deal with raw meat” and that they had gotten raw chicken that needed to be put away. (TR 59). Yoho testified that Frank told him that Frank had not been told that he had to provide gloves to kitchen staff and told Yoho to just use his bare hands. Yoho told Frank he wasn’t going to do that. (Id). In his second exchange with Frank,

probably fifteen (15) minutes later, in the kitchen, Frank was on his way out the back door and Frank said “put this chicken away” and Yoho told him “no, I’m not doing that without gloves.” At that point, Yoho testified that Frank said something to the effect like “I don’t need to provide gloves” and said as he was leaving “use a plastic bag or something” (TR 60, 61). After that, Frank left (TR 61). Yoho testified he went on to have discussions with his co-workers about the lack of gloves (TR 61, 62) and that they decided they would just have to wash their hands after each time they touched raw meat (TR 62). At some point, Scott suggested that he go next door and ask Little Nippers, the pizza place two (2) stores down, if they had spare gloves to get through the day. Around 2:00 PM, Yoho did that and got a handful of gloves to use for the rest of the day. (TR 62, 63).

Yoho’s testimony then shifted to the evening of June 29th (TR 63). He testified that the dining room was being run that night by Carlie Cain, a bartender (TR 63, General Counsel Exhibit 2). Yoho testified he had discussions with the other employees in the kitchen on June 29th about staffing (TR 64), the difficulty the staff in the kitchen had keeping with the orders that were coming in (TR 66).

Yoho then described several interactions he had with Carlie Cain, beginning around 7:00 PM, “when it seemed that the orders were not slowing down, and if anything, they were getting more numerous” where he told Carlie that “we needed to close the kitchen.” (TR 67). Yoho testified “There was no way we could catch up with the stuff that we already had currently. We certainly couldn’t take any more orders, and still make everything the way it needed to be by the end of the night.” (Id). That first conversation, according to Yoho, occurred at approximately five (5) minutes until 7:00

PM (Id). Yoho testified that had Carlie turned around and immediately closed the restaurant, it would have been at least two (2) hours early, but instead, Carlie told him “There is no way we are closing the restaurant.” Yoho responded “We needed to close, or else we were going to walk-out” (TR 68). Yoho, in response to a question by Judge Sandron testified “I told her – that first exchange was just generally, you know, that we – I said that we would walk-out.” (TR 69). Yoho testified that after he told Carlie that we would walk out, he first discussed a walk-out with Aiden and Scott (TR 69, 70). In the week leading up to June 29, 2021, Yoho testified that he had talked with Aiden and Scott two (2) times about walking out and that they had had five (5) or six (6) discussions about it leading up to that point (TR 70). In response to questioning by Judge Sandron, Yoho reiterated “OK. The first time I just said ‘we need to close the kitchen or else we are going to shut it down’ and Carlie walked away.” Yoho stated he did not tell Carlie about the walk-out until later when he had talked to the other employees (TR 71). Again, in response to a question by Judge Sandron, Yoho testified the second time he talked to Carlie about walking out was after he talked to his co-workers. At that time, he approached Carlie again and told her “you know Carlie, we – we – we will walk out if we don’t close by 8:00 PM.” He gave her a certain time “if we don’t close by 8:00 PM, we will walk-out” and Yoho testified that was after he made sure with the other employees and Carlie said “You’re not walking out” and then she walked away. (TR 72). Yoho then testified he had a third conversation with Carlie as 8:00 PM approached. The third conversation, according to Yoho, “came as we were getting closer to that 8:00 PM time. I would say it was about fifteen minutes before, and we were still getting slips. So, when I saw her again, I was like, ‘Carlie are we closing’ and she said ‘no’ and just walked off.”

(TR 72). Yoho testified he only saw her for a brief moment and she was running around (Id). That was the last conversation he had with Carlie before he and Aiden Smith walked out. (TR 72, 73). Notably, the record is void of any evidence indicating that Yoho ever told a manager that he and Aiden Smith were walking out, and even more notably, that he ever explained to anyone, including Carlie Cain, the bartender, the reasons for the walk-out.

Yoho testified that both Aiden and Scott agreed with the walk-out and that they told the younger servers “Hey, these dishes that you are sending back, the slips, aren’t getting made.” (TR 73). Yoho testified that he talked to Scott and Aiden about the walk-out and they walked out (TR 74). The last interaction he said he had with Carlie Cain was a question “are we closing?” and the only people he talked to when he walked out were the servers who he told what was going on. (Id).

Importantly, Judge Sandron asked Yoho whether he spoke with one of the supervisors or someone he thought was a supervisor when he left (TR 74). Judge Sandron asked “But did you actually have any conversation with her [Carlie] when you walked out? Just a yes or no.” Yoho responded “I would say no.” (TR 75). By his testimony, the only person Yoho spoke with about his and Aiden’s plan to walk out at 8:00 PM was Carlie Cain, who by General Counsel’s own Exhibit was not a supervisor, or manager, but was a bartender (General Counsel Exhibit 2).

General Counsel Exhibit 2 reflects that on June 29, 2021 Yoho punched in for his shift at 10:45 AM and punched out at 7:56 PM (TR 76). Aiden Smith’s time is also recorded in General Counsel Exhibit 2 and shows a punch-out time for him of 7:58 PM (TR 76, 77).

Judge Sandron then asked Yoho “How many employees actually walked out?” and Yoho answered “three”. (TR 77)

Yoho testified that Scott did not punch-out but he did walk-out and that Scott left early (TR 78). Judge Sandron then asked Ms. Stern who was the third employee who walked out and Ms. Stern replied “That was Mr. Whitacker and he did not punch-out.” (TR 79). Yoho testified that Whitacker never punched-out and Bado’s attorney interrupted and pointed out in Exhibit 2 that Whitacker did punch-out, at 9:47 PM (Id). Judge Sandron again asked Yoho whether Scott Whitacker walked-out with him and Yoho responded “Yes, he did” (Id). Yoho then testified that Whitacker had a cigarette break and didn’t punch-out, but it was his understanding that Whitacker was going to punch-out. Yoho testified “I found out later that he was just having a cigarette, and went back in.” (TR 79). Yoho finally admitted that Whitacker did not walk-out with him, but he went back to work and there were only two (2) employees that walked-out (TR 80).

Yoho then testified about the events which occurred on July 1, 2021. Yoho testified he was scheduled to start work on July 1st at 11:00 AM and went in at 10:00 AM so he could talk to Frank about “our conditions” (TR 80, 81). Yoho testified he was able to speak with Mr. Badolato that morning. He testified that when he went in, he found Frank at the grill and asked him if they could go somewhere private to talk to which he said “It is private now” (TR 81). Yoho testified he pulled out a – pieces of paper from his pocket that were sort of notes that he had to follow along with and he told Frank “These aren’t demands. They are requests.” (TR 81). He “read off of my notes about the I, Section 7, that protects concerted effort of protest.” Yoho testified he told Frank that Section 7 protected us for concerted effort, and he went on to say that, the biggest issue

we had, “we” referring to the kitchen staff, was a lack of having enough people and so that the first thing he said was that Frank needed to hire more people. Yoho testified Frank said “Are you telling me how to run my business?” (TR 82). Yoho testified he told Frank what the situation was and he was just telling him how things stand. Yoho testified “I said that we needed to hire at least one more chef, preferably two, and that we needed a full-time dishwasher.” (TR 82, 83). Yoho testified Frank told him “You don’t get to tell me how to run my business” and Yoho told Frank there were more things on the list than that that he needed to talk about and that sanitation was a big issue to which Frank responded “Like what?” (TR 83). Yoho told Frank “How about the rain that was coming through the ceiling over the grill” to which Frank said “I fixed that.” Yoho told Frank that it took Frank at least three (3) weeks to do that, so it had been an issue for a long time before it got fixed. (Id).

Yoho testified that after he mentioned the sanitation and he told Frank that he had even more things to talk about, Frank said “You don’t even work here anymore. Why are we talking about this?” Yoho testified he said “Frank, I do still work here.” (TR 84) and said “I do still work here and I care about what happens here, and I want to talk to you about what we need to do moving forward”, to which Frank said “You quit. You walked-out.” (TR 85). Yoho contends he told Frank “I walked-out. I didn’t quit.” And said “I am here to work today after we talk” and Frank, again, said “No you’re not, because you quit.” (TR 85). This conversation went back and forth, according to Yoho, several times until Frank said “Get out of my kitchen” and Yoho responded “Frank, if I am fired, I will leave. If I am not fired, I am working today.” Yoho contends that Frank continued working and didn’t really say anything so Yoho told him “you know, I have protection.

In this scenario, I don't think you should fire me." (Id). At that point, Yoho testified Frank got very still and he looked at me and he said "Are you fucking threatening me?" (Id). Yoho testified he said "No" then Frank took a few steps toward me, until he was very close and then he said "Are you fucking threatening me? Are you coming in her and fucking threatening me?" Yoho testified he responded "No, I am not threatening you" and said "I didn't quit, and I will work today." (TR 85, 86).

Yoho testified that Frank told him he was not coming back here and advised him don't come into this business again, to which Yoho told Frank not to talk to him like that and that he would come back when Frank calmed down, but Frank was not going to scream at him (TR 86). The conversation ended, according to Yoho, when he said "Frank, if I am fired, I will leave. If not, I will come back later. Am I fired?" To which Frank "finally" said "Yes, you're fired. Get the fuck out of my kitchen." At that point Yoho left. (TR 86, 87). Yoho testified that he had a handwritten list which he did not hand to Frank (Id). After he left the restaurant, Yoho testified that he parked in the parking lot behind the building, called his ex-partner to try to calm down a bit, contacted Aiden to ask if he was okay with Yoho reaching out to the Labor Board (TR 88, 89). Yoho confirmed that he had recently shaved his head and that while he often wore a hat at work, he was not wearing a hat when he went to speak with Frank Badolato on July 1st. (TR 89, 91).

On cross-examination, Yoho testified that prior to July 1, 2021, the only issue he ever talked about with Frank Badolato was the one concerning the gloves (TR 92, 93). That discussion occurred on June 29, 2021, in the morning and Yoho characterized the issue with the gloves as only his issue with sanitation saying "I didn't want to claim

anyone else's issues with sanitation" (TR 93). Yoho admitted that none of his co-workers asked him to talk to Frank about the gloves and that he decided on his own to talk to Frank about the gloves (TR 93, 94).

Yoho went on to admit that the only issue that he ever discussed with Frank Badolato about the terms and conditions of employment, his working conditions, the circumstances of his employment, the short staffedness, the lack of a dishwasher, before July 1, 2021, including from the outset of his employment until the time of his walk-out with Aiden, was his complaint about the gloves (TR 95, 96). When asked to explain why he never addressed any of those issues with Frank, before he decided to walk-out on June 29th, Yoho testified he planned to talk about all of those issues the morning of July 1st and the walk-out was because the only other time he ever saw Frank was when work was busy and he was always in passing. (TR 96, 97). Yoho testified that he couldn't attest to when Frank was and was not at the restaurant, but he admitted testifying that he saw him on Friday nights, Sunday mornings, when he was preparing the food truck and when he was bringing supplies to the restaurant (TR 97). Yoho testified that when he was there when Frank was preparing the food truck that would happen during the day, in the morning and that he saw Frank bring stuff from Restaurant Depot, supplies, between 1:00 PM and 3:00 PM, occasionally (TR 98). When asked why, when Yoho saw Frank between 1:00 PM and 3:00 PM that he didn't discuss any of the issues with him that he said he was having for weeks, Yoho testified because he was busy working. (TR 98). When asked about his Affidavit, where he attested that between 1:00 PM and 3:00 PM he had a down time where he talked to his co-workers about the complaints, he didn't find time to voice his concerns, his complaints, his objections to Mr. Badolato (TR 98, 99).

So, Yoho testified, despite the fact that he had a myriad of concerns about food safety, about leaking on the grill, about the short staff situation that he didn't see fit, for as important as those issues were, not only to him but to the group, to say "Frank, give me a minute" (TR 100). When asked by Mr. Linkosky "Who appointed you to be the spokesperson for the employees?", the testimony went as follows:

A. I – do you mean, who asked me to walk in that morning?

Q. Yeah.

A. I had the list.

Q. Who asked – I am asking you, who, among the other employees, appointed you to be the person to go and to confront Frank on July 1st?

A. Nobody.

Q. You did it on your own?

A. I did it for my co-workers.

(TR 101).

Yoho admitted, when he walked in on July 1st to confront Frank, Aiden was already back to work the day before and he knew that Aiden was back to work (Id). Yoho finally also admitted that Scott Whitacker never left work when Yoho and Aiden walked-out (TR 102).

Yoho testified he was acting on behalf of Randy Bishop and to a degree, George Pikris, on July 1st. Yoho testified "although he was the manager, I felt that he could handle himself better than we could." (TR 102). Yoho testified that both Randy Bishop

and George Pikris were managers and that neither Randy Bishop nor George Pikris told Yoho to go to Frank on July 1st with any concerns on their behalf. (TR 102, 103).

Yoho also admitted that while he didn't recall see Marianna Logston on June 29th, he did recall that when Marianna was working and it was time for her to leave, she would leave through the kitchen and say good night to whoever was in the kitchen, to whoever she passed (TR 105, 106). Yoho testified he wouldn't have noticed, necessarily when Marianna was leaving, despite the fact that she would have walked past every work station where he could have been (TR 106). Yoho testified that when he told Carlie "We have to close the kitchen" he did not give her a reason, but gestured around and said "we can't keep doing this" (TR 112). Following the first conversation with Carlie at 7:00 PM, he had a second conversation where he said to Carlie "If we don't shut the kitchen down, we were going to walk-out, yes." (TR 113). Yoho never testified that he gave Carlie, or anyone else, any reason for he and Aiden walking-out on June 29, 2021. When asked if Yoho still possessed the list that he brought with him on July 1, 2021 when he confronted Frank, he stated "Not on me. I do still have it in my possession, though." When asked "You have it, and nobody asked you to bring it with you today?" Yoho responded "No" (TR 115). Yoho admitted that as his conversation with Frank Badolato on July 1st progressed, Frank became visibly upset and accused Yoho of threatening him, before telling Yoho to leave (TR 117).

Yoho went on to testify that no one from Bado's called him and told him not to come back after he left on June 29th or June 30th (TR 124).

General Counsel next presented the testimony of Aiden Smith, Yoho's co-worker who walked-out on June 29, 2021. Smith testified he was schedule to work from 11:00

AM until about 8:00 – 8:30-ish and that he was working on that day with Yoho and Scott Whitacker (TR 136).

Smith testified there was not anyone in charge of the kitchen that day and while he was not exactly sure who was in charge of the restaurant, he knew that Carlie was up front and she would tell them when they would be closing that night. (TR 137). Aiden Smith did not recall any issues in the kitchen that day, on June 29th and testified “It was just a fairly standard, normal Tuesday.” (TR 138).

He remembered that it was a busy night that escalated to Mr. Yoho and he walking-out. (Id).

In response to questions by Judge Sandron, Smith recalled having discussions about walking-out before the walk-out occurred with Scott Whitacker and Yoho (TR 139, 140) and there were separate, distinct conversations about the walk-out, the first being at around 6:15 PM then at 6:45 PM. (TR 1389, 140). The conversations occurred in the work area and Smith could not recall what was said among the employees in the first conversation, but at the end of the talking among themselves, Smith said they decided maybe they should actually walk-out on that day. (TR 140, 141). Smith, again in response to a questions by Judge Sandron, did not remember anything specific about the second conversation the employees had and that it was the third conversation that eventually went from them just talking about walking-out to actually walking-out (TR 141).

Again, in response to questioning by Judge Sandron, Smith could not recall who said what during the third discussion, which occurred about 7:30 PM to maybe 7:45 PM. The outcome of that last discussion, according to Mr. Smith was that Yoho and he

clocked-out and went outside, where Scott had already been outside and they all just kind of talked and then Yoho and he went their separate ways (TR 141). Judge Sandron asked whether Smith talked to anybody else before he walked-out that day and Smith recalled a conversation with a server that came out to say she was disappointed in them and that was about it. (TR 142). Mr. Smith recalled the conversation between Frank Badolato and Yoho concerning the gloves that morning at approximately 11:30 AM and recalled hearing Frank say something about not buying gloves every week because it would be expensive and Yoho had talked about not having gloves to make the orders. (TR 142, 143). Again, in response to questioning by Judge Sandron, Smith indicated he did not remember anything else that either Yoho or Frank Badolato said in that conversation. Smith confirmed that only he and Yoho walked-out that night and that Scott Whitacker stayed in the kitchen when he and Yoho walked-out (TR 143, 144). In response to additional questioning by Judge Sandron, Smith recalled that he and his co-workers had talked about being understaffed and wanting another cook for the grill, so that Whitacker wasn't so much stuck on the grill and he could move around and help out if needed and having another dishwasher so they wouldn't have to keep doing dishes, having air conditioning so they wouldn't be so hot (TR 146). Smith recalled having those conversations with Scott Whitacker, Yoho and Randy Bishop (Id). Aiden Smith did not recall discussions about sanitation or any other issues or problems in the kitchen (Id).

On cross-examination, Aiden Smith recalled that he was hired at Bado's in the Fall of 2019 and had been continuously employed there since (TR 147, 148). Smith testified he never asked Frank about being short-staffed and was never present when anybody else talked to Frank about being short-staffed (TR 149). Smith admitted that

they didn't talk to any supervisor on June 29, 2021 before they walked-out and that it was Yoho's idea to walk-out (TR 150). Aiden Smith testified that Yoho said they should walk-out because it wasn't fair to everyone in the kitchen for them to be working in the conditions that they were, those conditions being that they were under-staffed and extremely hot (TR 150, 151). Smith testified he was aware that he could have called Frank or Chris Smith or someone else to get extra help and while he was aware he could have done that, he testified none of them thought of it (TR 151). Aiden Smith was not present when Yoho spoke with Carlie about walking-out (TR 152).

Aiden Smith testified he never asked Yoho to go and represent his concerns to anybody in management (TR 153) and that at the time he and Yoho walked-out, Scott said that he thought they were just taking a break before going back and finishing the shift (TR 153). Aiden Smith went on to testify that when he went to work the next day, he went in and apologized to Carlie for leaving her the way he had and for leaving her strung-up (TR 154). The conversation occurred out front behind the bar when he came to work at approximately 10:45 AM (Id). Aiden did not remember anyone else being there when he spoke with Carlie and recalled that she said she accepted his apology and that she understood that it got a little heated and he wasn't thinking clearly (TR 155). Following his conversation with Carlie, he went to work and was never disciplined for walking-out the previous night (Id). In response to a question by Judge Sandron, Smith testified he did not suffer any consequences for having walked-out (TR 155). Judge Sandron asked Aiden Smith if he had a conversation with any other managers about walking-out and Smith replied "On Friday, I talked to Frank and apologized to him for walking-out." That was the Friday after June 29, 2021 (TR 156). Smith's testimony was

that Frank said he accepted his apology and that was the end of the conversation. (Id). After much discussion between counsel and Judge Sandron, Aiden Smith testified he learned about the demands made by Yoho on July 1st and Yoho coming in with a list for Frank, after that incident had already happened (TR 159). Judge Sandron then read in a portion of Smith's Affidavit submitted to the General Counsel as follows:

"Roo told me that he spoke to Frank [indiscernible] staff, and needed to have a working AC in order to keep the place at a reasonable temperature. I learned about the demands after it happened. Roo did not ask my opinion on the demands or if he should talk to Frank about them. Judge Sandron indicated the witness has testified what he is referring to in that paragraph was a list that Mr. Yoho presented." (TR 160, 161)

Finally, Smith testified that he clocked-out at 7:58 PM on June 29, 2021 and the kitchen was supposed to close at 8:00 PM or 8:15 PM (TR 164, 165). Smith admitted he had walked-out between two (2) and seventeen (17) minutes before the end of his shift. (TR 165).

General Counsel then rested its case.

The next witness to testify, on behalf of the Respondent, was Frank Badolato. Frank testified he owns Bado's Pizza Grill and Ale House and has for thirty-seven (37) years (TR 171).

Frank agreed with Yoho's description of the front of the house and the back of the house. Frank testified he was never approached by employees about short-staffing and that since the Pandemic started, he has had difficulty hiring new employees. (TR 171, 172). Frank testified that he had signs in his windows, internet ads on Indeed, signs on

his chalkboard out in the front of the restaurant, notes in the men's room, on the front door of the men's room and by the urinals, advertising for employees, for dishwashers and phone people that they normally had before. Frank testified that the phone people were generally high school kids and none of them came around during the Pandemic to do that type of work. Frank testified he couldn't find any kitchen staff and there weren't even people calling on the ads. (TR 172). Frank testified he converted everything to disposals to try to deal with the dishwashing situation. He testified there was no silverware at all, no plates at all, there were no glasses and he was spending \$200 a week on Styrofoam cups and plastic cups that they were using instead of having a dishwasher. (TR 172, 173). He testified the only thing the kitchen staff had to clean was their stations and the utensils that they were using. There were no glasses, there was no silverware and there were no plates (TR 173). He testified that he is in the restaurant every morning at 5:00 AM, seven (7) days a week and when his staff comes in at 11:00 AM, he usually goes to the office to do an hour or two (2) of paperwork and then if anything is needed, that his purveyors didn't bring in, he will go to the Restaurant Depot and pick things up (Id).

Frank testified he is available to employees to discuss things all of the time whether he is in the restaurant or not. He testified he was available for employees to talk to "24/7" that some of the employees have his telephone number and if they don't they can get a hold of him by telling Marianna, Carlie or Kelsey out front or Leah and those individuals would get in touch with him, or they would leave a note on the bulletin board (TR 175). Frank testified that there was an issue with gloves not coming into the restaurant on Tuesday, June 29th when one of his purveyors, Pennsylvania Macaroni

Company was out of gloves, just like Restaurant Depot was out of gloves and Bado's Restaurant was out of gloves (TR 176). Frank testified that when the gloves did not come to the restaurant, he called Curtze, another purveyor and they said "We will have them for you tomorrow" and the gloves were there the next day. (Id). Frank testified there is no Allegheny County Health Department Requirement that people who work in a restaurant have to wear gloves and that in the thirty-seven (37) years he has worked in the restaurant, he has never worn gloves (TR 176, 177). Contrary to Yoho's testimony about his personal complaint concerning the gloves, Frank testified he told Yoho "They are not here right now, and they will be here as soon as I can get them here" and so then I called Curtze and they were there the next day. (TR 177). Frank testified that prior to July 1, 2021 Yoho did not complain to him about short-staffing and that Yoho never complained to him about anything, except the gloves that one time (Id). Frank testified that on June 29th he was at home with his son-in-law Chris, his other son-in-law Nolan and his two (2) daughters and they were starting construction for an addition that he put on his house for his in-laws when Carlie called Leah, Frank's daughter and that as a result of that phone call, he went to the restaurant (TR 177, 178, 179). Frank testified in response to questioning by Judge Sandron that he went to the restaurant a little bit after 8:00 PM and that when he got there, he went into the kitchen and Scott was working and there were orders at different stations that weren't done yet. Frank and his son-in-law Chris, immediately started making the orders and got the food out (TR 179, 180). Frank testified that Leah first told him that people had left the kitchen and because of that, he went to the restaurant immediately (TR 180). Frank testified that when he got there, he finished the orders and the restaurant closed. (Id). Frank testified he did not hear from

Mr. Yoho the next day, but that Aiden actually came in and went to work the next day (Id). Judge Sandron asked the witness when he got to the restaurant, what was backed-up and Frank answered “the pizza station, where the orders were not made. Scott was working on the grill and there were some things for salads. My second was to Scott and Chris started going and I was – I made the pizzas.” (TR 181). Frank testified in response to a question by Judge Sandron as to whether he was able to get caught up, that he did get caught up in approximately fifteen (15) minutes. (Id). Frank testified the restaurant closed at approximately 8:30 PM that night and that by the time he got in there, at approximately 8:15 PM, within fifteen (15) or twenty (20) minutes, he they got everything out. (Id).

Frank explained to Judge Sandron the normal flow of the pizzas coming out (TR 181, 182, 183).

Frank then testified about what happened on July 1st with Yoho. Frank testified he was “in the restaurant a little earlier than 5:00 AM and that while he was next to the grill and was down to turn on his chef’s tables, he turned and there is somebody there. He testified he stood up and there was Yoho, right there in front of him, and immediately starts his list of demands and with the paper and I am like – I mean, I didn’t even know what he was talking about and he starts mentioning all of these statutes from the NLRB and he – I mean, he physically intimidated me.” (TR 184). Frank explained to the Judge how Yoho physically intimidated him by first explaining that when he stood up and saw Yoho, the first thing he noticed was that Yoho looked like Robert DeNiro in “Taxi Driver” and Frank thought “what’s going on here?” (TR 184, 185). Frank testified Yoho’s head was shaved and he was screaming at Frank with his face approximately two

(2”) inches away from Frank’s face (TR 185). Frank related that Yoho started screaming “all of these demands. You can’t fire me” and then he started screaming about “You are going to fire me aren’t you. You’re going to fire me, aren’t you” and Frank said “I am not firing you. You walked out and you know you were gone” and Yoho kept on with “You’re going to fire me” “You’re going to fire me” (TR 185).

Frank testified that he told Yoho to get out of his kitchen (Id).

Judge Sandron asked Frank to describe what happened, from the beginning and Frank testified “as soon as I stood up from lighting my – my grill and my chef’s table lit, he was like right in my face and he was going like this with his paper and screaming about these demands that he has and how ‘you can’t fire me’ and the NLRB statutes and stuff. I didn’t know what he was talking about or anything about the NLRB. I have been in business for thirty-seven (37) years and I have never had a problem like that” (TR 186). Frank testified that Yoho first raised the issue of him being fired and was goading Frank into saying he was fired (Id). Frank testified “He must have said it a dozen times” (Id). Frank testified he never once said that Yoho was fired, not once did I ever say ‘you’re fired’” (TR 187) and that Frank only told him “Get out of my kitchen. Get out of my face and just go.” (TR 187). Frank testified Yoho finally left but he could see him sitting in his car in the parking lot. Frank testified he continued to do prep work and when he looked outside, Yoho was still in the car after fifteen (15) or twenty (20) minutes and Frank was still worried (Id). Frank testified because of Yoho’s behavior and his worry, he called 911. Frank then testified that Yoho left (TR 188). Frank testified that Yoho had left early before and that he came to work the next day. (TR 188). Frank then testified there is nobody else at his restaurant that disciplines employees besides him,

nobody else that can hire anyone besides him, nobody that can fire an employee except him and that nobody that was heard or named in connection with the events at the restaurant is responsible for hiring, firing, disciplining, time off, cut the pay, cut the hours, nothing regarding employees except Frank (TR 190).

Judge Sandron permitted Respondent's counsel to ask whether Frank would take Yoho back to work and Frank responded "on that day, absolutely not" (TR 191). Frank was asked whether he would take Yoho back to work on that day and he responded "absolutely not" (TR 191) nor would he take Yoho back to work now "well, because he threatened me" (TR 192).

On cross-examination Frank related how after the kitchen is closed, the kitchen staff needs to clean-up their areas and then punch-out when they leave. After the kitchen is closed, there is a period of time however, when the bar is still open (TR 195). Frank testified that the reason why Scott Whitacker was at the restaurant on June 29th until 9:47 PM and there were servers that worked until 9:30 PM or later was because Scott had to clean the kitchen and the waitstaff had to stay until the customers are off the property (TR 195).

Respondent then presented the testimony of Marianna Logston, the office manager at Bado's (TR 197). Marianna recalled that on June 29, 2021 she left between 7:00-7:30 PM and that when she leaves she goes through the bar, starts at the bar and asks the bartenders if they need anything and that she then says good-bye to the bartenders and then she says good-bye to all of the servers and then she always exits through the kitchen back door and always says good-bye to all of the kitchen staff (TR 198). Marianna recalled who was working on June 29th and testified that she saw Carlie,

Aiden, Andrew (Yoho) and she believed Scott was there too (TR 199). She recalled saying goodnight to the three (3) people in the kitchen that night, saying “goodnight guys. See you later. Stay cool” because it was a warm day that day, very hot that day. Marianna did not recall the kitchen staff saying anything to her other than good-bye, goodnight, have a good evening and that all three (3) people in the kitchen, Scott, Yoho and Aiden, all said good-bye to her that evening (TR 199, 200). Marianna testified that as the office manager at Bado’s, if there is a concern by employees during the time that she is there, they can bring that concern to her, although, no one has ever brought a concern of the nature involved with this case to her before. (TR 200).

Marianna testified that besides the heat, there was nothing out of the ordinary she observed when she left through the kitchen of the restaurant between 7:00-7:15 PM on June 29, 2021 and the volume of business at the restaurant that evening seemed very normal (TR 201). Marianna also testified, in response to questioning by Judge Sandron, that she has an office at the restaurant that she shares with Frank and Leah (TR 203, 204), but that they all have separate desks (Id).

The last witness called by the Respondent was Leah Badolato, Frank’s daughter and the general manager of the restaurant. Leah described her daily routine as “I am there running the place, making sure it is open to close, everything from inventory, beer orders, hires, help with payroll sometimes, run the social media, scrub the floors, bus the tables, you name it, I have done it.” (TR 206). Leah recalls on July 1, 2021 that she had dropped her husband off at the airport before coming in to the restaurant. She walked into the office like she always does first thing in the morning and she found her father sitting on the phone with the Police (TR 207). Leah testified that what she observed

about her father when she came to work that day was “I observed a very distressed man, worried man, who my father is neither of those” (TR 208). She observed “in his eyes, he was scared, on the phone with the Police” (TR 209). Following the testimony of Leah Badolato, the Respondent rested.

Issues

- A. DID GENERAL COUNSEL PROVE THAT ANDREW YOHO ENGAGED IN PROTECTED CONCERTED ACTIVITY AND WAS TERMINATED FROM EMPLOYMENT BECAUSE HE ENGAGED IN SUCH PROTECTED ACTIVITY?**
- B. IN THE EVENT THE COURT DETERMINES ANDREW YOHO DID ENGAGE IN PROTECTED CONCERTED ACTIVITY, WAS HIS BEHAVIOR ON THE MORNING OF JULY 1, 2021 SUFFICIENT TO WARRANT HIS DISCHARGE FROM EMPLOYMENT?**
- C. IN WHOSE FAVOR SHOULD THIS COURT MAKE CREDIBILITY DETERMINATIONS?**

Argument

A. GENERAL COUNSEL DID NOT PROVE THAT ANDREW YOHO ENGAGED IN PROTECTED CONCERTED ACTIVITY AND, THEREFORE, HE COULD NOT HAVE BEEN TERMINATED FROM EMPLOYMENT BECAUSE HE ENGAGED IN SUCH PROTECTED CONCERTED ACTIVITY.

Bado's is charged, in the Complaint, with terminating Yoho's employment on July 1, 2021, as the result of engaging "in concerted activities with other employees for the purposes of mutual aid and protection by complaining with other employees and walking out in protest over staffing shortages" (Complaint Paragraph 7(a)) and as a result of Yoho, engaging "in concerted activities for the purpose of mutual aid and protection by verbally complaining about staffing shortages and unsanitary conditions in the kitchen" on July 1, 2021 (Complaint Paragraph 7(b)).

In *Good Samaritan Medical Ctr. V. NLRB*, 858 F.3d 617 (1st Cir. 2017), the court discussed the analysis which must be undertaken to determine whether or not actions of a single employee can be deemed to be protected "concerted activity" engaged in for "mutual aid or protection, or whether such actions or complaints should properly be classified as individual concerns not protected under the Act.

The court stated that *Section 8(a)(1)* of the National Labor Relations Act (hereinafter "Act or NLRA") makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in *[section 7 of the Act]*." 29 U.S.C. § 158(a)(1). One of the rights guaranteed to employees in *section 7* of the Act is the right to "engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. See *El Gran Combo de Puerto Rico v. NLRB*, 853 F.2d 996, 1002-004 (1st Cir. 1988).

As the Supreme Court has noted, "the term 'concerted activity' is not defined in the Act" *City Disposal Systems*, 465 U.S. at 830. The Court explained in *City Disposal Systems* that in enacting *section 7*, "Congress sought generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment." *Id.* at 835. The Court stated that while "concerted activity" plainly "embraces the activities of employees who have joined together in order to achieve common goals," *id.*, at 830, what is not clear from the language of the Act is "the precise manner in which particular actions of an individual employee must be linked to the actions of fellow employees in order to permit it to be said that the individual is engaged in concerted activity." *Id.*

In its *Meyers* decisions, the Board clarified the test it applies to determine whether an employee's actions are linked sufficiently to the actions of fellow employees so as to be deemed "concerted." *See Meyers Indus., Inc.*, 268 N.L.R.B. 493 (1984) ("*Meyers I*"), *rev'd sub nom. Prill v. NLRB*, 244 U.S. App. D.C. 42, 755 F.2d 941 (D.C. Cir.), *cert. denied*, 474 U.S. 948 (1985), *on remand*, *Meyers Indus., Inc.*, 281 N.L.R.B. 882 (1986) ("*Meyers II*"), *aff'd sub nom. Prill v. NLRB*, 266 U.S. App. D.C. 385, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied*, 487 U.S. 1205 (1988). In *Meyers I*, the Board held that safety complaints concerning a company truck made by a single employee acting on his own were not "concerted activity" within the meaning of *section 7* of the Act. The Board stated that an employee's action may be deemed "concerted" for purposes of *section 7* only if the action is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers I*, 268 N.L.R.B. at 497 (footnote omitted). In *Meyers II*, the Board explained that its objective standard of

concerted activity "encompasses those circumstances where individual_employees seek to initiate or to induce or to prepare for group_action, as well as individual_employees bringing truly group complaints to the attention of management." *Meyers II*, 281 N.L.R.B. at 887.

In *Manimark v. NLRB*, 7 F.3d 547 (6th Cir. 1993), the court held that the Act accords employees the right to form and join unions and to "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. It is deemed an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of" these rights. 29 U.S.C. § 158(a)(1). To establish a violation of §§ 157 and 158(a)(1), the Board must show "that the employee was engaged in such protected concerted activity, that the employer knew of the activity and its concerted nature, and that the employee's protected activity was a motivating factor prompting some adverse action by the employer." *Ajax Paving Indus., Inc. v. NLRB*, 713 F.2d 1214, 1216 (6th Cir. 1983). The employer may then affirmatively defend by proving by a preponderance of the evidence that the employee would have been discharged in any event for unprotected conduct. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400, 403, 76 L. Ed. 2d 667, 103 S. Ct. 2469 (1983).

In *Prill v. NLRB*, 835 F.2d 1481 (U.S. App. D.C. 1987), the United States Court of Appeals for the District of Columbia Circuit affirmed a National Labor Relations Board Decision concluding that the Petitioner was not involved in "concerted activity" and therefore not protected under the National Labor Relations Act. As affirmed in *Prill*, a worker can no longer take "concerted action by himself unless he acted on the authority of his co-workers." According to the holding in *Prill, supra.*, a worker no longer takes

concerted action by himself unless he acts on the authority of his fellow workers. After *Meyers I*, supra. and *Prill*, supra., concerted action cannot be imputed from the object of the action. “In other words, if a worker takes action by himself without contacting his fellow employees, even though he has a desire to help all workers, not just himself, he will not have satisfied the concerted action requirement.” *Meyers II*, supra. However, a workers is still deemed to have taken concerted action when he acts with the actual participation or on the authority of his co-workers. *Id.*

In light of this framework, it is clear, based upon the testimony of Yoho at trial, that he was not engaged in any protected concerted activity on either June 29, 2021 or July 1, 2021.

Yoho complained, on June 29, 2021, about what he considered to be his “biggest issue”, the lack of plastic gloves. (TR 48) Yoho testified he first complained about the lack of gloves for kitchen staff to use, directly to Frank Badolato. (TR 58) Yoho describes two (2) separate instances where he asked Frank Badolato about the gloves and Badolato responded to him. (TR 58-61) Notably, when asked about whether his complaint about the gloves was his complaint alone or was also the complaint of fellow employees, Yoho unequivocally admitted that it was his complaint, alone. (TR 93) Yoho admitted that none of his coworkers asked him to talk to Frank about the gloves and that was a decision he made on his own. (TR 93,94) Based on this testimony, it is clear that Yoho’s complaining about the gloves on June 29, 2021 was not protected concerted activity under the cases cited above.

The second incident which occurred on June 29, 2021 which General Counsel characterizes as protected concerted activity involves a walk-out by Yoho and Aiden

Smith, shortly before 8:00 PM that evening. (TR 67-75). The walk-out, according to Yoho, was discussed with Smith and another kitchen employee, Scott Whitacker, in advance of it happening and Yoho gave an ultimatum to Carlie Cain, a bartender at the restaurant, on three (3) occasions prior to the walk-out. (TR 69-73).

Notably, Yoho never complained to anyone in management on June 29, 2021 that the kitchen was understaffed, it was too hot, they were too busy or any of the other reasons advanced by Yoho for his walk-out. (TR 74,75) Yoho did not even inform Carlie Cain, immediately before the walk-out, that he and Smith were leaving and the reasons they were leaving. (TR 75) It is uncontroverted that Yoho never received a call from Bado's following the walk-out, telling him to not come back to work or that he was terminated as the result of the walk-out and, to the contrary, Aiden Smith, the only other participant in the walk-out, reported to work the next day and is still working at the restaurant. (TR 101,124) There was no evidence presented by the General Counsel that Yoho ever told anyone in management, or otherwise, the reason for the walk-out or that he was disciplined in any way for the walk-out.

In its analysis of whether the June 29, 2021 walk-out by Yoho was in any way involved with the termination of his employment on July 1, 2021, it is incumbent for this Honorable Court to analyze the facts in light of the test established in *Wrightline*, 251 NLRB at 1083. In *Wrightline*, *supra.*, the NLRB held that General Counsel had to first make a prima facie showing "that the employee's conduct protected by §7 was a substantial or a motivating factor in the discharge." *Transportation Management*, 462 U.S. @ 399-400. The Court held the test is satisfied by General Counsel demonstrating "(i) the employee's engagement in the protected activity; (ii) the employer's knowledge

of that activity; (iii) the employer's antipathy toward it; and (iv) a causal link between the antipathy and the adverse employment action. *EC Waste, Inc. v. NLRB*, 359 F.3d 36, at 42 (1st Circuit 2004) (citing *Transp. Mgmt.* 462 U.S. at 401-3). The Defendant can either rebut the prima facie showing or it can prove "by a preponderance of the evidence that the discharge rested on the employee's unprotected conduct as well and that the employee would have lost his job in any event." *Transp. Mgmt.* 462 U.S. at 400. In other words, "proof that the discharge would have occurred in any event and for valid reasons amount[s] to an affirmative defense on which the employer carries the burden of proof by a preponderance of the evidence." *Id.*

Here, even if Yoho's conduct on June 29, 2021, when he walked-out with Aiden Smith, could have amounted to protected concerted activity, the record is completely devoid of any evidence concerning the employer's knowledge of that activity or the employer's antipathy toward it. First, based on Yoho's description of the events of June 29, 2021, there is no indication that he ever gave management any indication of the reasons for the walk-out. Instead, Yoho told a bartender that if she didn't stop taking orders, they were closing the kitchen at 8:00 PM and, without giving any specific reasons, he and Aiden Smith left the restaurant before closing. The record shows that it wasn't like Yoho didn't have an opportunity to report his complaints to management and, to the contrary, it is uncontradicted that Marianna Logston, the restaurant office manager, left the restaurant at approximately 7:30 PM that evening, after Yoho had told the bartender that the kitchen needed to close, but before Yoho and Smith walked out. (TR 198) Marianna Logston testified that when she left through the kitchen that evening, while it was hot in the kitchen, she did not observe any unusual conditions or anything

out of the ordinary. (TR 201) Likewise, the record is devoid of any evidence that Yoho, Smith or Whitacker, or anyone else for that matter, complained to her about the conditions they were allegedly dissatisfied with.

Additionally, when Yoho testified about his interaction with Frank Badolato on July 1, 2021, he did not even mention anything about the walk-out on June 29, 2021. Again, there is no indication in the record that Frank Badolato, or anyone else in a management position, knew the reason for the walk-out and, Frank Badolato apparently characterized Yoho's behavior on the 29th as him quitting.

Because General Counsel had failed to meet the *Wrightline*, *supra*. test regarding the walk-out on June 29, 2021, that event cannot qualify as "concerted activity" for purposes of analyzing the reason that Badolato refused him permission to return to work.

With respect to the issue of "concerted activity" the events that occurred on the morning of July 1, 2021 are even more clear.

While Yoho testified that he came into the restaurant and approached Frank Badolato to discuss issues to the kitchen staff, including understaffing, the need to hire at least one more chef, preferably two as well as a full-time dishwasher (TR 82, 83) and that sanitation was a big issue, including rain that was coming through the ceiling over the grill (TR 83).

Most importantly, Yoho admitted that the only issue he had ever discussed with Frank Badolato about the terms and conditions of employer, his working conditions, the circumstances of his employment, the short staffedness, the lack of a dishwasher before July 1, 2021 was his complaint about the gloves (TR 95, 96). Yoho testified he planned to talk about all of those issues on the morning of July 1st (TR 96). Most importantly,

when asked “Who appointed you to be the spokesperson for the employees?, the testimony went as follows:

A. I – do you mean, who asked me to walk in that morning?

Q. Yeah.

A. I had the list.

Q. Who asked – I am asking you, who, among the other employees, appointed you to be the person to go and to confront Frank on July 1st?

A. Nobody.

Q. You did it on your own?

A. I did it for my co-workers.

(TR 101).

Yoho then testified that he was acting on behalf of two managers when he went to see Frank Badolato on July 1st (TR 102). He then testified that neither Randy Bishop nor George Pikris told him to go talk with Frank Badolato on July 1st with any concerns on their behalf. (TR 102, 103).

Based upon the holdings in *Meyers I*, *supra*. and *Prill*, *supra*., because Yoho admits that none of the other kitchen staff, whether they be employees or management, ever asked him or appointed him to be their spokesperson to talk with Frank Badolato on July 1, 2021 about any terms and conditions of their employment, Yoho’s actions on that date fail, as a matter of law, to be protected “concerted activity”.

There was also testimony concerning a prospective meeting between the kitchen staff and management about which Yoho mistakenly gave the impression that the

employees were planning to schedule that meeting. To the contrary, the meeting referred to by Yoho was not to occur as the result of any action by the employees, individually or collectively, but, as Yoho admitted on examination by Judge Sandron, was a meeting that was planned by management (TR 108, 109). The scheduling of a meeting with employees by management is not a protected activity.

Based upon Yoho's testimony, as well as the testimony of Aiden Smith, who said that he never even found out about Yoho's meeting with Frank Badolato on July 1, 2021 until after it occurred and he never authorized Yoho to approach Badolato with any concerns (TR160, 161), General Counsel has failed to prove that Yoho engaged in any protected concerted activity.

In the absence of proof that Yoho engage in protected concerted activity, the Complaint must be dismissed and Judgement entered in favor of the Respondent, Bado's.

B. IF THE COURT DETERMINES ANDREW YOHO ENGAGED IN PROTECTED CONCERNED ACTIVITY, HIS BEHAVIOR ON THE MORNING OF JULY 1, 2021 IS SUFFICIENT TO WARRANT HIS DISCHARGE FROM EMPLOYMENT.

Bado's contends that General Counsel failed in its burden to prove that Yoho engaged in any protected concerted activity either on June 29, 2021 or in the morning of July 1, 2021, such that the Complaint should be dismissed. In the event that this Honorable Court determines that Yoho's behavior on either of those days constituted protected concerted activity, Yoho's behavior towards Frank Badolato on the morning of July 1, 2021 is sufficient to justify his termination from employment.

In *General Motors, LLC and Charles Robinson*, 2020 NLRB Lexis 378, Case Nos. 14-CA-197985 and 14-CA-208242, the Board revised the standard utilized to analyze

cases where an employer discharged or otherwise disciplined an employee who had engage in abusive conduct in connection with activity protected by Section 7 of the Act. Prior to ***General Motors, LLC***, the Board had employed a four-factor test set forth in ***Atlantic Steel Co.***, 245 NLRB 814 (1979) under which it would have considered 1. the place of the discussion; 2. the subject matter of the discussion; 3. the nature of the employee's outburst and 4. whether the outburst was, in any way, provoked by an employer's unfair labor practice. In ***General Motors, LLC***, *supra.*, the Board held that, going forward, such cases would be analyzed under the Board's familiar ***Wrightline*** standard. If the General Counsel alleges that discipline was motivated by Section 7 activity and the employer contends that discipline was motivated by abusive conduct, causation is at issue. The Board stated that as in any ***Wrightline*** case, the General Counsel must make an initial showing that (1) the employee engaged in Section 7 activity, (2) the employer knew of that activity, and (3) the employer had ominous against the Section 7 activity, which must be proven with evidence sufficient to establish a causal relationship between the discipline and the Section 7 activity. The Board held that if General Counsel has made this initial case, the burden of persuasion shifts to the employer to prove it would have taken the same action even in the absence of Section 7 activity.

Under this framework, it is clear that regardless of whether Yoho had engaged in protected activity on July 1, 2021, he would have terminated for his behavior.

Frank Badolato testified that he was in the restaurant on the morning of July 1, 2021 and while he was next to the grill and was on the floor turning on his chef's tables, he got up and Yoho was there "right there in front of him". (TR 184). Frank testified that Yoho

immediately stated with his list of demands and with the paper and Frank didn't even know what he was talking about when Yoho started mentioning all of the statutes from the NLRB and he "I mean, he physically intimidated me" (*Id*). Frank explained to Judge Sandron how Yoho physically intimidated him by first stating that when he stood up and saw Yoho, the first thing he noticed was that Yoho looked like Robert DeNiro in "Taxi Driver" and Frank thought to himself "What's going on here?" (TR 184-185). Frank testified Yoho's head was shaved and he was screaming at Frank with his face approximately two (2") inches away from Frank's face (TR 185). Frank related discussion with Yoho and that Yoho started screaming his demands and "You can't fire me" and then started screaming about "You're going to fire me, aren't you. You're going to fire me, aren't you" at which point Frank said "I'm not firing you. You walked out and you know you were gone." (*Id*). Finally, after Yoho kept on screaming about being fired, Frank testified he told Yoho to get out of his kitchen (*Id*). Judge Sandron asked Frank to describe, in detail, from the beginning what happened and that after the encounter, Frank saw Yoho sitting in his car in the parking lot and after fifteen (15) or twenty (20) minutes, Frank became more concerned that Yoho intended him harm, so Frank called 911 (TR 187, 188). Judge Sandron then permitted Respondent's counsel to ask whether Frank would take Yoho back to work and Frank responded "On that day, absolutely not" (TR 191) and when asked whether he would take Yoho back to work now he responded that he would not. "Well, because he threatened me" (TR 192).

Frank's testimony is consistent with the Respondent's position that had Yoho conducted himself in the manner of a normal person, he could have come back to work without issue. Instead, the record supports that Yoho shaved his head and physically

menaced Frank Badolato, along with screaming just several inches from Frank's face, demanding that Frank fire him and then sitting outside in the parking lot in back of the restaurant for fifteen (15) or twenty (20) minutes until Frank became so concerned that he called the Police.

While the employer here contends that General Counsel failed in its initial burden under *Wrightline* to show any protected concerted activity, in the event this Court should find, against the evidence, that General Counsel had met that burden, Frank's description of Yoho's behavior, his fear as a result of that behavior and his clear, unequivocal statement that he would not take Yoho back to work because "he threatened me" should provide a sufficient basis to find that any disciplinary action taken against Yoho as the result of his confrontation with Frank Badolato on July 1, 2021 was wholly justified by Yoho's conduct.

Because of the manner in which Yoho conducted himself on July 1, 2021, by physically intimidating and threatening the owner of Bado's, the Complaint should be dismissed and a verdict rendered in favor of the Respondent.

C. THIS HONORABLE COURT SHOULD FIND THAT THE TESTIMONY OF FRANK BADOLATO AND THE RESPONDENT'S WITNESSES, AS WELL AS THE TESTIMONY OF AIDEN SMITH, WAS ALL MORE CREDIBLE THAN THE TESTIMONY OF YOHO.

This Honorable Court asks the General Counsel and Respondent's counsel to submit an argument on the issue of credibility.

Based upon the testimony adduced at the Trial, it is patently clear that Yoho repeatedly attempted to mislead the Court in several key elements of his testimony.

First, Yoho initially made it sound as if the kitchen staff had gotten together and decided to approach management about scheduling a meeting to discuss them being short-staffed, the absence of a dishwasher and heat in the kitchen. (TR 50, 51) Not until during Attorney Linkosky's cross-examination of Mr. Yoho did he come clean that the staff meeting was not the idea of the employees, but that it was a meeting planned by management (TR 108, 109) of which he was informed by George Pikris (*Id*). At that point, Judge Sandron stated "So that was not at an employee meeting, apart from management. It was a management sponsored meeting that he understood was going to take place" (TR 109) and the witness confirmed it was supposed to be a sit-down meeting with management for the people in the kitchen and it never happened. (*Id*).

Yoho also was misleading in his responses to questions about how many employees walked out on June 29, 2021 and who walked out with him. Yoho testified that he spoke to Scott and Aiden about the walk-out and that they both walked out (TR 74). Judge Sandron then asked Yoho "How many employees actually walked out?" and Yoho answered "three" (TR 77). Yoho then testified that Scott Whitacker did not punch-out but he did walk out and that Scott left early (TR 78) and Judge Sandron then asked Ms. Stern who was the third employee who walked out and Ms. Stern replied "That was Mr. Whitacker and he did not punch-out." (TR 79). Yoho then testified that Whitacker never punched-out and was corrected in that General Counsel's Exhibit 2 showed that Whitacker did punch-out, at 9:47 PM (*Id*). Judge Sandron again asked Yoho whether Scott Whitacker walked out with him and Yoho responded "Yes he did" (*Id*). Yoho finally admitted that Whitacker did not walk-out with him, but that Whitacker went back

to work and there were only two (2) employees who walked out (TR 80), he and Aiden Smith.

Yoho was evasive as to whether he raised his voice to Frank Badolato on July 1, 2021 and also as to whether any of the other employees appointed him or asked him to approach Frank on July 1, 2021 about the alleged concerted complaints. Yoho went so far as to infer that Randy and George, both managerial employees according to General Counsel's Exhibit 2, somehow wanted him to approach Frank with the demands, yet when pressed, he admitted that neither of them ever asked him to do so. (TR 102, 103)

Likewise, when Yoho was asked by Attorney Linkosky on cross-examination "Who appointed you to be the spokesperson for the employees?" Yoho responded:

A. I – do you mean, who asked me to walk in that morning?

Q. Yeah.

A. I had the list.

Q. Who asked – I'm asking you, who, among the other employees, appointed you to be the person to go and confront Frank on July 1st?

A. Nobody.

Q. You did it on your own?

A. I did it for my co-workers. (TR 101)

While Yoho may have believed he was confronting Frank on July 1st for his co-workers, he did admit that none of his co-workers had ever asked him to do that.

In short, Yoho's testimony is ripe with inconsistencies and embellishments which reflect poorly on his credibility. On the other hand, in his testimony, Yoho admits certain

behavior and facts that are determinative of the status of his complaints and is supportive of Bado's defense.

Yoho's repeated admissions that no member of the kitchen staff asked him to approach Frank on July 1, 2021 removes his behavior on that day from the realm of protected concerted activity. Likewise, on questioning by Judge Sandron, Yoho admitted that he never told any member of management, prior to his walking out on June 29, 2021, the reasons for the walk-out, other than his repeated statements to Carlie that if she didn't stop taking orders, he would shut the kitchen down. Again, these admissions show that no one in management, on June 29, 2021, had any idea about Yoho's or the other kitchen staff's complaints on that night, or the reasons for the walk-out. In fact, as was demonstrated by Aiden Smith's testimony, the walk-out was never discussed with Frank until Friday of that week, which would have been July 2, 2021, a day after Yoho confronted Frank. Aiden Smith also credibly testified that he never authorized Yoho to act on his behalf and that he didn't even know Yoho was going in to confront Frank until after the fact. Aiden's testimony in this regard corroborates Yoho's admission that he was acting alone on July 1, 2021, and is the only testimony propounded by the General Counsel which attributes any knowledge to management, in this case Frank Badolato, of the walk out on June 29, 2021.

Marianna Logsdon, the Respondent's officer manager, offered un rebutted testimony that on June 29, 2021 she left the restaurant between 7:00 – 7:30 PM and that she recalled who was working on June 29th and testified that she saw Carlie, Aiden, Yoho and Scott (TR 199). She recalled saying good night to the three (3) people in the kitchen that night and telling them to "stay cool" because it was warm day, very hot that day. (*Id*)

Marianna did not recall the kitchen staff saying anything to her other than good-bye, good night, have a good evening and that all three (3) people in the kitchen, Scott, Yoho and Aiden, all said good-bye to her that evening (TR 199, 200). She also testified she didn't notice anything out of the ordinary when she left through the kitchen that evening and that, as the office manager at Bado's, if there is a concern by employees during the time that she is there, they can bring that concern to her (TR 200).

Ms. Logsdon's testimony was essentially unchallenged by General Counsel.

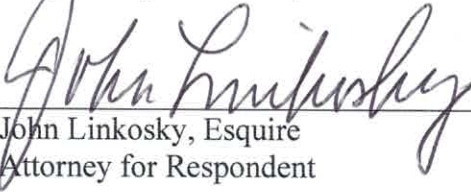
The last witness who testified was Leah Badolato, Frank's daughter, who is the general manager of the restaurant. While she was not present on the evening of June 29, 2021 or during Yoho's discussions with Frank on the morning of July 1, 2021, she testified that when she got to the office, after dropping her husband off at the airport, she walked into the office and found her father sitting on the phone with the Police (TR 207). She testified that she observed her father being "a very distressed man, worried man, whom my father is neither of those" (TR 208). She observed "in his eyes, he was scared, on the phone with the Police" (TR 209). Again, Ms. Badolato's testimony was not refuted by the General Counsel.

Because, as stated above, Yoho's testimony was embellished and, at times evasive, if credibility determinations need to be made by this Honorable Court, they should be made in favor of Respondent's witnesses and Aiden Smith, who all testified in a forthright and factual manner, without attempting to evade the questions or embellish their answers.

Conclusion

For the foregoing reasons, the Respondent respectfully requests this Honorable Court to enter Judgement in its favor and against Andrew Yoho on the Complaint.

Respectfully submitted,



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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SIX**

**PIZZA PIAZZA, INC. D/B/A BADO'S PIZZERIA
& DELICATESSEN AND D/B/A BADO'S PIZZA
GRILL AND ALE HOUSE**

Respondent

And

Case 06-CA-279445

ANDREW YOHO, and Individual

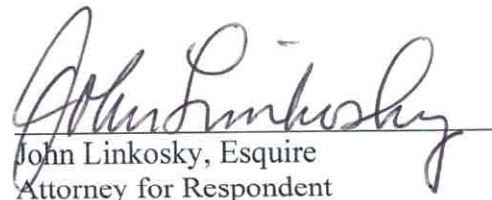
Charging Party

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Brief for Respondent was served upon the below listed parties this 30 day of May, 2022, by electronic mail:

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